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# CERTIFICATE

## Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~575~~ 29

CLINTON R. WHITE

*vs.*

GEORGE E. Q. JOHNSON AND H. D. HAYES

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FILED JANUARY 15, 1930

(34,704)

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# SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 2, 1930

[fol. 1]

**IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, TUESDAY, DECEMBER 3, 1929**

4119

CLINTON R. WHITE

vs.

GEORGE E. Q. JOHNSON and H. D. HAYES

Appeal from the United States District Court of the Northern District of Illinois, Eastern Division

STATEMENT OF FACTS

On this appeal certain questions of law have arisen, concerning which this court is in doubt and desires the instruction of the Supreme Court.

The relevant facts out of which the legal questions grow are:

Appeal was taken to this court from an order entered October 16, 1928, by the United States District Court for the Northern District of Illinois, denying application of plaintiff-appellant for an injunction pendente lite against defendants. The injunction prayed for was to restrain the United States Attorney for the Northern District of Illinois and the local Supervisor of Radio, Department of Commerce, from enforcing the penal provisions (Secs. 32 and 33) of the Radio Act of 1927 against plaintiff either for violation of the provisions of that Act or for violation of an order of the Federal Radio Commission dated August 22, 1928.

[fol. 2] Since August 15, 1926, appellant has continuously owned and operated a radio station in the City of Chicago of the type and character commonly known as a broadcasting station, under the call letters WCRW. Appellant has had successive licenses, first from the Secretary of Commerce under the Act to Regulate Radio Communication of August 13, 1912, and, after the enactment of the Radio Act of 1927 on February 23, 1927, from the Federal Radio Com-

mission. Appellant's first license from the Secretary of Commerce was issued August 15, 1926, as a result of an application therefor by appellant in which application appellant designated the normal sending wave-length of his station as 720 kc. and requested the call-letters WCRW. The license covered a period of three months and, on its expiration, was succeeded by a succession of licenses similar in form and in duration, each issued by the Secretary of Commerce on the application of appellant, until the termination of said Secretary's authority by the Radio Act of 1927. On February 10, 1927, in compliance with the Joint Resolution of Congress, approved December 8, 1926, and as part of an application for licenses attached thereto, appellant executed and filed with the Secretary of Commerce a statement as follows:

"The applicant hereby waives any right or any claim of right, as against the United States, to any wave-length, or to the use of the ether in radio transmission, because of previous license to use the same or because of the use thereof."

From August 15, 1926, until April 26, 1917, appellant operated his station with a power of 1,000 watts.

After the establishment of the Federal Radio Commission, the Commission issued successive licenses to appellant from time to time, each license being preceded by a written application executed, sworn to, and filed by appellant. Each application contained the following statement:

[fol. 3] "The applicant waives any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests a radio station license in accordance with this application."

Each license issued by the Commission to appellant contained the following condition:

"This station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave-length designated in the license beyond

the term thereof nor in any other manner than authorized therein."

The licenses issued by the Commission from time to time were for varying periods but never in excess of three months.

The first license issued by the Commission was dated April 26, 1927, and authorized appellant to operate his station on 760 kc. with 500 watts. The next license was dated June 15, 1927, and authorized appellant to operate his station on 1340 kc. with 500 watts. All licenses thereafter until September 1, 1928, authorized appellant to operate on 1340 kc. with 500 watts. Under all licenses issued by the Commission appellant has had to divide time with two other stations.

Since September 1, 1928, as a result of action of the Commission taken on August 22, 1928, appellant has been authorized to operate his station with only 100 watts, on a division of time with two other stations. This action of the Commission, which led to the filing of the bill of complaint herein by appellant, was preceded by the following proceedings:

On January 12, 1928, appellant duly filed an application for a renewal of the license then held by him (for 500 watts on 1340 kc. on a division of time with two other broadcasting stations). This license originally covered a period of sixty (60) days beginning November 1, 1927, but was extended from time to time for short periods of from thirty to sixty days so that it finally expired on September 1, 1928. [fol. 4] On May 25, 1928, the Commission entered an order known as General Order 32 in which, after reciting that it had examined appellant's said application for renewal of license, together with similar applications on the part of 163 other broadcasting stations, and that it was not satisfied that public interest, convenience or necessity would be served by granting any of said applications, the Commission fixed Monday, July 9, 1928, ten o'clock A. M. in its offices at Washington, D. C., as the time and place for a hearing on each of said applications. The Commission notified appellant of the order by mailing a copy of it to appellant, which copy was accompanied by a letter addressed to appellant stating, among other things:

"At this hearing unless you can make an affirmative showing that public interest, convenience or necessity will be served by the granting of your application, it will be finally denied."

Similar letters accompanied by copies of the order were sent to the 163 other broadcasting stations covered by the order.

On July 9, 1928, appellant appeared before the Commission by counsel, as did a large proportion of the other broadcasting stations included in the order, and hearings on the applications of said stations were set at various times during the following two weeks. The hearing on appellant's application for renewal was held partly on July 16, 1928, and partly on July 23, 1928.

On August 22, 1928, the Commission took action with reference to appellant's application as follows:

"Federal Radio Commission, Washington, D. C.

File No. 138. Docket No. 109

"In re Application of Clinton R. White, Station WCRW, for Renewal of License

[fol. 5] "Order

"The Commission having considered the evidence and the arguments presented to it in the above-entitled case, heretofore heard and taken under advisement, and having found that public interest, convenience or necessity would not be served by granting said application unless the power heretofore used by the applicant be reduced to 100 watts, and then only subject to such changes in authorized frequency, power, and hours of operation as the Commission may in the future find to be in the public interest, convenience or necessity, or necessary in order to comply with the provisions of Section 5 of the Radio Act of 1928, and further subject to such extension or extensions of the applicant's existing license, thus modified with respect to authorized power, as the Commission may hereafter order.

"It is ordered that, pending the issuance of a renewal of said license in accordance with said findings, the existing

license of said applicant be, and the same is hereby, modified by reducing the power authorized therein to 100 watts; this order to be effective on September 1, 1928, at the hour of 3 o'clock A. M., Eastern Standard Time.

"It is further ordered that said existing license, thus modified, be, and the same is hereby, further extended for a period of thirty (30) days to terminate at 3 o'clock a. m. Eastern Standard Time, October 1, 1928.

"Federal Radio Commission, by Ira E. Robinson, Chairman.

"Dated August 22nd, 1928."

Appellant received a copy of the foregoing on or about August 24, 1928. Appellant filed his bill of complaint on September 12, 1928.

[fol. 6] The approximate value of the physical equipment constituting appellant's station is $5,000.00. Up to the time of filing his bill of complaint appellant had expended approximately $16,472.89 in the operation of the station. The gross revenues derived by appellant from the station, consisting of payments by advertisers for the broadcasting of advertising material from the station, amounted to $160.00 in 1926 (4½ months, $7,433.45 in 1927, and $8,925.87 in 1928 (7 months). It does not appear that on or prior to February 23, 1927, appellant's station was operating at a profit and presumably it was not. At the time of filing the bill of complaint and for some time prior thereto, however, appellant's net profits from the station were about $400.00 a week. Appellant is dependent upon this income as his chief source of livelihood.

The physical equipment constituting appellant's station is so designed that it will not operate efficiently or satisfactorily with power as low as 100 watts. To broadcast efficiently and satisfactorily with 100 watts appellant will have to replace a very substantial portion of his present apparatus with new and different apparatus. The reduction in power has caused a reduction in the area served by appellant's station to not more than one-fourth its former size with the result that appellant has lost a large proportion of his listening public and his advertising clientele.

## Questions Certified

The questions concerning which this court desires advise are herewith presented:

Question 1. Did a person who, prior to the enactment of the Radio Act of 1927, applied for and was granted successive licenses by the Secretary of Commerce for the operation of a broadcasting station, and who owned and continuously operated such broadcasting station, whereby it developed a following of listeners and advertisers which constituted a going business, have or acquire thereby property [fol. 7] in the continued operation of such station, with power appropriate to continue the operation of said business, within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States?

Question 2. If the answer to Question 1 is in the affirmative, is the Joint Resolution of Congress of December 8th, 1926 valid as against the claim that by virtue of the waiver it requires it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

Question 3. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that, by virtue of the waiver required in the last paragraph of Section 5 and by virtue of the condition required to be contained in all licenses by subparagraph (A) of Section 11, it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

Question 4. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in its action on an application for renewal of license by a person such as is described in Question 1, to take private property for public use without just compensation, either by denying such application or by granting it on such terms as virtually to destroy a going broadcasting business of such person?

Question 5. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting upon an application for renewal of license by said person, to deprive such person of such prop-
[fol. 8] erty without due process of law, in that the only standards provided by the Act for the guidance of the Commission in acting upon such applications are that of "public interest, convenience or necessity" and that set forth in Section 5 of the Amendatory Act of March 28, 1928, and in that the Act fails to require that the Commission, prior to proceeding to a hearing or decision on such application, shall specify in what respect it deems or has failed to find that the granting of such application would not serve public interest, convenience or necessity?

The clerk of this court is hereby directed to transmit a certified copy hereof to the Supreme Court of the United States.

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[fol. 9] Clerk's certificate to foregoing omitted in printing.

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Endorsed on cover: File No. 34,704. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 573. Clinton R. White vs. George E. Q. Johnson and H. D. Hayes. Certificate. Filed January 15, 1930. File No. 34,704.